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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 283

JOSEPH LASAGNA,

Petitioner,

vs.

WILSON McCARTHY AND HENRY SWAN, TRUSTEES OF AND FOR THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, A CORPORATION.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH AND BRIEF IN SUPPORT THEREOF.

PARNELL BLACK,
Counsel for petitioner.

WILLARD HANSON,
DAVID A. WEST,
B. E. ROBERTS,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 283

JOSEPH LASAGNA,

Petitioner,

vs.

WILSON McCARTHY AND HENRY SWAN, TRUSTEES OF AND FOR THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, A CORPORATION,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH AND BRIEF IN SUPPORT THEREOF.

To The Honorable Chief Justice and Associate Justices of The Supreme Court of the United States:

The Petition of Joseph Lasagna respectfully shows:

Summary and Short Statement of Matter Involved

The Supreme Court of Utah denied and took from petitioner the right of trial by jury guaranteed him by the Constitution in an action arising under the Federal Employers' Liability Act, where the evidence clearly demon-

strated that respondent failed to exercise reasonable care in furnishing petitioner, their employee, with a safe place to work, and that such failure proximately contributed to the cause of his injuries and said Court, contrary to the will of Congress as expressed in the Federal Employers' Liability Act and to the holdings of this Court as expressed in its controlling decisions construing the Act, allowed, permitted and sanctioned the recrudescence of the outlawed defense of contributory negligence.

The trial court submitted the issues of the case to a jury which returned a unanimous verdict awarding petitioner substantial damages. The trial Judge overruled respondents' motion for a new trial.

The Supreme Court of Utah vacated the verdict, reversed the judgment and ordered petitioner's case dismissed, the court being of the opinion that there was no issue of negligence to submit to the jury as in its judgment the evidence conclusively established that respondents were not negligent as charged, and did establish that petitioner's own negligence and lack of care was the sole proximate cause of his injuries.

Petitioner contends that in reaching this result the Utah Court ruled contrary to the principles of law announced by this Court in *Bailey* v. *Central Vermont Ry., Inc.*, 319 U. S. 350, 87 L. Ed. 1444, 63 S. Ct. 1062; *Ellis* v. *Union Pacific R. R. Co.*, 67 S. Ct. 598; *Pauly* v. *McCarthy, et al.*, 67 S. Ct. 102 reversing 166 P. (2d) 501; *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 87 L. Ed. 610, 63 S. Ct. 444; *Tennant* v. *Peoria & Pekin Union R. Co.*, 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520; *Tiller* v. *Atlantic Coast Line R. Co.*, 323 U. S. 574, 65 S. Ct. 421, 89 L. Ed. 465; *Blair* v. *Baltimore & O. R. Co.*, 323 U. S. 600, 65 S. Ct. 545, 89 L. Ed. 490; *Laven-*

der v. *Kurn,* 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 692; *Keeton, Administratrix of Keeton, dec'd* v. *Guy A. Thompson, Trustee in Bankruptcy for Mo. Pac. R. R. Co.,* 326 U. S. 689, 66 S. Ct. 135, 90 L. Ed. 57; *Cogswell* v. *Chicago & Eastern Ill. R. R. Co.,* 328 U. S. 820, 66 S. Ct. 1122; 90 L. Ed. 945; *Jesionowsky* v. *Boston & M. R. R.,* 67 S. Ct. 401.

In the above cases this Court definitely declared that questions of fact such as resolved by the Utah Court in these proceedings, as matters of law, must be submitted to the jury, and that the refusal of trial courts to submit such issues to juries and that the vacating of supported verdicts is nothing short of an abdication of the court's sworn duty to guard and protect the rights of litigants suing under the Federal Employers' Liability Act to jury trial; that to thus deprive railroad workers of the benefits of this right is to take from them a goodly portion of the relief afforded by Congress.

Jurisdictional Statement

(a) Jurisdiction to grant this petition is sustained by Section 237 of the Judicial Code as amended, subparagraph (b), Section 1, Chapter 229, 43 Statutes 937, Title 28, U. S. C. A. Section 344.

(b) The Statutes of the United States applied by the Supreme Court of Utah are 45 U. S. C. A., Sections 51-59; 35 Stat. 65, as amended; 36 Stat. 291, and 53 Stat. 1404.

(c) The judgment of the Supreme Court of Utah was rendered on February 28, 1947. It is set forth at (R. 252, 266), is not yet reported in the Utah Reports, but appears at 177 P. (2d) 734. The petition for rehearing was denied May 20, 1947 (R. 267). This petition for certiorari was filed August 20, 1947.

Questions Presented

The question presented is whether the Supreme Court of Utah properly applied the United States Statutes commonly called the Federal Employers' Liability Act, or whether the application made by it is inconsistent and in conflict with applicable decisions of the Supreme Court of the United States. The Utah Court in this case which arose under said Act held that petitioner was not entitled to have the issues of his cause submitted to a jury because as matter of law: (a) Respondents were not guilty of failure to use reasonable care in furnishing their employee with a safe place to work; when, according to the evidence, the railroad yards wherein petitioner was required to work were extremely dangerous and hazardous due to the fact that many varied, complex and dangerous switching operations were carried on within said yards by relatively inexperienced crews, and that car inspectors, including petitioner, were required to work in said yards while said switching operations were being performed without the protection of blue flags, blue lights, switch locks or other safety devices, or proper safety rules, regulations or practices. (b) There was no duty on respondents' part to exercise reasonable or any care to procure knowledge and advice with respect to the methods and practices followed in the yards where their servant was required to work. (c) Respondents were under no obligation to determine whether their servant was protected while engaged in the performance of his duties by safety rules, regulations, practices or devices. (d) Respondent's ignorance of the conditions, methods and practices existing and followed in the yards where their servant was required to work, fully insulated them against liability for the injuries sustained by him. (e) The safety rules, regulations and methods promulgated

by respondents as protection for car repairmen and inspectors while working in their own yards provided respondents a complete defense against petitioner's cause even though such safety rules were never promulgated, enforced or respected in the yards where he was required to work. (f) Petitioner's failure to preserve his own safety by appropriate response to the common and fundamental instinct of self-preservation was the sole cause of his injuries. (g) The protection afforded petitioner under the custom followed by the inspectors in their efforts to protect against the dangers and hazards of their work as enhanced by the lack of safety rules, regulations or devices to wit: "every man must look out for himself" was greater than the safety afforded by defendants' blue flag rule or the Navy switch lock rule, and therefore, constituted a complete discharge of the admitted duty to promulgate and enforce proper safety rules and provide adequate safety devices. (h) That petitioner's conduct in failing to look out for himself was the sole proximate cause of his injuries when, as matter of fact, his conduct, was nothing more than contributory negligence.

Reasons Relied On for Allowance of Writ

The Supreme Court of Utah has decided a Federal question of substance and importance in a way not in accord with the applicable decisions of the Supreme Court of the United States. It has set aside a verdict by the jury supported by substantial evidence and reversed the judgment based thereon and ordered the dismissal of petitioner's cause in a case involving the rights of an employee of an interstate carrier by railroad arising under and protected by the Federal Employers' Liability Act. By its decision, the Utah Court has usurped the functions of the jury contrary to the repeated admonitions of this Court. It has

arbitrarily set aside a finding of the jury, based upon substantial evidence, to the effect that respondents were negligent as charged, and that their negligence contributed to the cause of petitioner's injury, and, has allowed, sanctioned, and permitted the outlawed defense of contributory negligence to defeat recovery in an action arising under the Act. The Utah Court has thus wrongfully deprived petitioner of his constitutional guarantee of trial by jury.

It is essential that a Writ be granted in order to determine important questions relating to the construction, interpretation and application of the Federal Employers' Liability Act in Utah, and specifically to determine whether or not the Utah Supreme Court will be permitted to continue to construe and apply the Federal Employers' Liability Act in a manner contrary to the decisions of the United States Supreme Court and other Federal Courts construing it. See *Ehalt* v. *McCarthy, et al.* (1943), 104 Utah 110, 138 P. (2d) 639; *Pauly* v. *McCarthy, et al.*, 166 P. (2d) 501, reversed by this Court in 67 S. Ct. 102, and the decision of the Utah Court herein.

Prayer

WHEREFORE, your petitioner prays that a Writ of Certiorari be issued out of and under the seal of this Court directed to the Supreme Court of the State of Utah commanding said Court to certify and send to this Court a transcript of the record in the case entitled *Joseph Lasagna, Respondent,* v. *Wilson McCarthy and Henry Swan,* Trustees of and for The Denver & Rio Grande Western Railroad Company, a Corporation, Appellants, No. 6979, including also the proceedings in said Supreme Court to the end that said cause may be reviewed and determined by this Court and the judgment of the Supreme Court reversed and the judgment of the Third Judicial District Court,

in and for Salt Lake County, State of Utah, reinstated herein.

JOSEPH LASAGNA,
By PARNELL BLACK,
Attorney for Petitioner,
530 Judge Building,
Salt Lake City, Utah.

WILLARD HANSON,
DAVID A. WEST,
1010 Boston Building,
Salt Lake City, Utah.

B. E. ROBERTS,
530 Judge Bldg.,
Salt Lake City, Utah,
Of Counsel.

Salt Lake City, Utah.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinion of Courts Below

The verdict of the jury in petitioner's favor and the judgment of the Court pursuant thereto were rendered on the 17th day of April, 1946 (R. 23, 24). The Opinion of the Supreme Court of Utah is set forth at R. 252 to 266, is not yet reported in the Utah Reports but appears at 177 P. (2d) 734.

Grounds on Which Jurisdiction of Supreme Court of the United States Is Invoked

The judgment of the Supreme Court of Utah was rendered on the 28th day of February, 1947 (R. 266). Petition for Rehearing was denied on the 20th day of May, 1947 (R. 267). Petition for Writ of Certiorari was filed on August 20, 1947. The judgment of the Supreme Court of Utah is based upon its application of the United States Statute commonly called the Federal Employers' Liability Act, 45 U. S. C. A., Secs. 51-59; 35 Stat. 65, as amended; 36 Stat. 291, and 53 Stat. 1404. The jurisdiction of the Supreme Court of the United States is invoked under Section 237 of the Judicial Code, as amended by Act of February 13, 1925, c. 229, Sec. 1; 43 Stat. 937; 28 U. S. C. A., Sec. 344, and the Act of February 13, 1925, c. 229, Sec. 8; 43 Stat. 940; 28 U. S. C. A., Sec. 350.

Statement of the Case

Petitioner, a first-class carman, thirty-five years of age, who had been employed by the respondents and The Denver and Rio Grande Western Railroad Company for seventeen years (R. 142), was injured while engaged in the performance of his duties under his employment as a car in-

spector in the railroad yards at the United States Naval Supply Depot, Clearfield, Utah, at about 3:00 o'clock P. M. on the 25th day of July, 1944 (R. 159).

Upon trial of petitioner's action brought under the Federal Employers' Liability Act the jury returned a verdict assessing total damages in the sum of $125,275.26 but deducted $85,000.00 for contributory negligence, making a net verdict for petitioner of $40,275.26 (R. 23).

Petitioner charged respondents, his employers, with negligently and carelessly failing to use and exercise reasonable care in furnishing him with a safe place to work, in that they commanded him to perform the duties of his employment as car inspector in yards where the inspectors were not protected by safety rules, regulations or devices; that the absence and lack of safety rules, regulations and devices made the place of work dangerous, hazardous and unsafe, and that as a result of such dangerous and hazardous condition petitioner was caused to and did suffer the grievous and permanent injury complained of by him.

By answer, respondents admitted that they rested under the duty of exercising reasonable care to furnish petitioner a safe place to work, admitted that they rested under a duty to establish, promulgate and exercise due care for the enforcement of reasonable rules and regulations, including a requirement that whenever repairmen, inspectors or other workmen were at work in, on, under or about an engine, car or train, a signal giving notice of the fact that a man or men were thus at work be placed in a position where it could be seen and give due warning of such fact to persons engaged in a switching or other movement of cars or engines to the end that no movement of an engine, car or train in, on, under or about which an employee might be working would occur and any personal injury to such employee would be avoided (R. 11).

Petitioner, while engaged in the act of inspecting a

coupler, was permanently injured and crippled when a switching crew kicked a cut of cars from the lead in onto the track where the car under inspection was standing (R. 158-159).

On the day of his injury, petitioner, pursuant to the directions of his boss Wikane, respondents' repair track foreman and assistant to the general car foreman (R. 205, 206, and 143), left his employment at Roper and proceeded to the Naval Depot at Clearfield to relieve the regular inspector Roseberry. He went directly to the shops and when Olsen, the Navy car inspector, arrived he and petitioner proceeded down along Track No. 9 inspecting the various cars on the track. Olsen was on the east side and petitioner on the west. They started at the northerly end of the cut and worked toward the south (R. 158). When they reached the third or fourth car petitioner was about fifteen feet ahead of Olsen and Olsen called him back, requesting him to look at a coupler which had been welded (R. 159). Petitioner turned around, looked to see if there were any engines in the yard, did not hear or see any, and proceeded to examine the coupler. He stated: "I had hold of both grab irons. I can remember I was going to step to go through, to see what he meant about the welding. The next thing I knew something hit me hard on the shoulder, and knocked me between the track. Then, from then on I was plenty dizzy. I was trying to keep the car truck from rolling me under, so it would finish me, on top of me." (R. 159).

In describing the occurrence resulting in injury to petitioner, Olsen testified:

> "A. We got down to about the fifth car; we were on the south end of the fifth car. I was on the east side of the car and he was on the west, and I noticed what I thought was a cracked coupler, in other words, a drawbar, so I started to look at it, but I called to Joe, because he has had more experience than I have: 'I think this

coupler is cracked. It has been welded a little,' and I asked him to look at it. He in turn looked at it, and I looked at it. We were in a sitting position, both holding on to a grab iron on the end of the car. I had my right hand on the grab iron, on the east side of the car, and he was on the west, when those cars hit this string of cars. I am not positive whether it was one or two cars. Some say it was two and some say it was one. I think two, but I am not positive of that. They knocked those cars down into us, and it dragged us both under the car. Joe went under and it cut his leg off. It pulled me under but I was lucky enough to get out." (R. 66).

"Q. Now, at the time that those two cars, as you have stated, came down into the string of cars that you were inspecting, did you have any blue flag up?
A. No sir.
Q. Did you have any locks for switches?
A. No sir.
Q. Anything of that kind?
A. No sir." (R. 68).

It appears from the record that the car inspectors in the railroad yards at Clearfield were required to work without the protection of safety rules, regulations or devices. While the car inspectors were engaged in their work, many varied, complex and dangerous switching operations were being performed in these yards by relatively inexperienced switch crews (R. 194) and the work of a car inspector was therefore fraught with great hazard.

In speaking of this, Navy Inspector Olsen stated: "Pardon me for a minute; but even the jury or anyone else that had to work in that yard out there would have had grey hair in a year" (R. 70).

From January 1, 1944, until July 25, 1944, the day petitioner was injured, respondents were hauling an average of four trains in and four trains out each day and each train contained from five to forty-five cars (R. 35-36). It thus

appears that respondents were handling an average of approximately 6000 cars every thirty days. The Union Pacific was handling practically the same number (R. 217-218). The operations pertaining to the switching and handling of these 12,000 cars a month in the yards were performed by relatively green and inexperienced crews (R. 194). During this time the Navy was using about nine Diesel switch engines in the yards and during the shift when petitioner was injured five or six of these Diesels were being used in the switching and handling of cars on the twelve tracks (R. 86, 87).

Prior to the date of his injury petitioner had, upon special direction, served respondents as a car inspector in the Naval Depot yards from March 13th to April 11th, 1944, and also on July 20th.

Petitioner's testimony clearly reveals the nature of his employment, the lack of safety rules, regulations and devices, and the causal relationship between the dangers of his work place and his injury. He was requested by Wikane, the assistant car foreman, to leave his usual employment in respondents' yards at Roper, Utah, and proceed to the Clearfield Naval Depot and relieve the regular car inspector Roseberry (R. 143). Wikane instructed: "You can get in there by going down to the agent at our station in Clearfield and ask him to help you get in," and "after you get in there—I have never been in there—there is a U. P. man and a Navy man working there. Ask them what there is to do" (R. 144). Responsive to his orders, he proceeded to the Naval Depot, was finally admitted, located the inspectors, introduced himself and asked them what his duties were (R. 145). Olsen, the Navy inspector, accompanied him into the yards where they commenced their labors. With reference to the work practice, petitioner was advised and instructed:

> "Q. When you went down was anything said about the use of anything to protect yourselves?

A. No, except when we started on the first car, I asked them why they did not use a blue flag. I noticed they started inspecting without a blue flag. I asked them why, because it had been my practice to use a blue flag all the time; and I don't remember which one it was, whether it was Olsen or Layton said: *'We don't use blue flags here. They would not be any good if we did have them.'*

So then I asked them, 'What other kind of protection have you got here?'

He said: *'We just have to look out for ourselves, like we always have done.'* " (R. 146).

It was definitely and positively established by the evidence that the admitted duty of promulgating and exercising due care to enforce adequate safety rules was violated and that the violation of this duty proximately contributed to the cause of petitioner's injury.

Herein of Blue Flags

Blue flags were never used in these yards during the whole course of petitioner's employment. Petitioner testified positively that blue flags were never used in the yards at any time while he worked there (R. 155, 158, 166). Navy Inspector Olsen likewise testified (R. 63, 64, 68, 72), as did Navy Inspector Bingham (R. 128). Roseberry, respondents' witness, testified that during a period of about six or eight weeks after he started working in the yards (July 7, 1943, R. 183), he tried to use blue flags but that the switch crews disregarded the blue flags and refused to respect or pay any attention to them; that after the second one had been run over he abandoned and discontinued their use altogether (R. 187, 189, 193, 196).

Kennedy, the Navy relief inspector, testified that he used blue flags as protection while engaged in his work (R. 202). This testimony, however, is in conflict with the testimony of Olsen and Bingham.

Olsen testified that he had never used or observed any other inspector using blue flags in the yards at Clearfield between January of 1944 and the date when petitioner was injured (R. 63). He testified that he had worked with Kennedy while Kennedy was inspecting cars in the yards (R. 74, 75).

Bingham testified that he had never used blue flags nor seen them used there prior to petitioner's injury (R. 128).

It is interesting to note that Kennedy was sent to the yards on special assignment to relieve Roseberry. Roseberry never used a blue flag during the period of Kennedy's employment in the yards. It is rather peculiar that Kennedy would adopt a practice contrary to that followed by the man he relieved.

The Court permitted respondents to take refuge behind the shield of their own ignorance concerning the practices followed and existing in the yard where they sent their servant to work. It appears, however, that respondents were never sufficiently concerned about the practices and methods being followed in the yards at Clearfield to make an inquiry, and that their regular car inspector Roseberry, who knew as much of the practices and methods being followed as any one and who was well aware of the lack and absence of safety rules and devices, and who knew that respondents' blue flag rule had never been respected, followed or enforced in the yards, was never sufficiently interested to report these conditions to anyone connected with the operation of respondents' railroad.

The enforcement of the blue flag rule would undoubtedly have saved petitioner from injury. In recognition of this fact, blue flags were provided in considerable abundance after the accident. Olsen testified "After the accident there were lots of blue flags around the yards" (R. 73).

Herein of Switch Locks

Switch locks were never provided or used during the whole period of petitioner's employment in the yards at Clearfield. Petitioner so testified (R. 164). Olsen testified that switch locks were never used in the yard until after the accident (R. 64, 68, 91, 95). Bingham's testimony is to the same effect (R. 128). Kennedy, the relief inspector, never used switch locks while he was employed as a car inspector in the yards.

Roseberry testified that when it became apparent to him that the switch crews would not respect the blue flag, he commenced locking the switches (R. 187). This testimony is in conflict with the testimony of the Navy inspectors who worked with him (R. 75, 121), and who positively testified that they had never seen switch locks used in the yards prior to petitioner's injury (R. 64, 128, 129). It is clear that no switch locks were ever provided for the use of car inspectors by either respondents, the Union Pacific Railroad Company, or the Naval authorities.

At best Roseberry's testimony falls far short of establishing any sufficient compliance with the admitted duty of furnishing proper safety devices. The switch lock, which he testified he used, was the padlock from his tool box (R. 194). There was substantial evidence that a switch could not be locked with these tool box padlocks (R. 100). Roseberry retained the key to the lock and petitioner had neither lock nor key on the day of his injury (R. 197). Roseberry never told anyone of his practice of locking the switches until after petitioner was injured (R. 197, 199, 200). He was never in the yards while petitioner was at work there (R. 194).

Kennedy, who was sent to the yards to relieve Roseberry, never used a switch lock and was never advised to do so by

Roseberry or anyone else. No switch locks were ever provided to Kennedy by his employer or the Naval Depot authorities at any time.

Neither Respondents' Nor the Navy's Rules Were Ever Promulgated, Enforced or Respected Prior to Petitioner's Injury.

From all the evidence, as above set forth in connection with blue flags and switch locks, it is clear that respondents' safety rules and regulations promulgated by them for the protection of their carmen, car inspectors and others employed in their yards generally, were never promulgated, enforced, respected or in effect in the Naval Depot yards at Clearfield.

Petitioner was never advised at any time with respect to the safety rules and regulations of the Navy. It is safe to say from the evidence that these rules and regulations were never promulgated, enforced, respected or in effect in the Clearfield yards at any time while petitioner was there employed. The Navy rule, as appears at R. 91, provides as follows: "The lead switch track on which carmen are working shall—locked with special locks; such tracks will be switched only after car inspector has given permission."

It is clear that this rule was never enforced, respected or in effect at any time prior to petitioner's injury. Switch locks were never provided for the use of Navy inspectors or respondents' inspectors, nor were they used by these men at any time prior to petitioner's injury, except as suggested by Roseberry (R. 64, 68, 91, 95, 128, 129).

The first copy of the Navy rules which Olsen ever obtained was given to him upon request after petitioner was injured (R. 92). Bingham became acquainted with the Navy rules after petitioner was injured (R. 128, 129). No claim was

ever made that any of respondents' inspectors were ever aware of the Navy rules before petitioner was injured.

It, therefore, becomes apparent that neither the Navy's nor respondents' safety rules were ever promulgated, enforced or respected within the Naval yards prior to petitioner's injury.

Herein of the Lookout Rule

It appears conclusively from the evidence that the car inspectors, while engaged in the performance of their duties, were required to depend upon their own vigilance as their only protection against the dangers of unexpected and sudden movement of the cars being inspected by the Naval switching crews. This thought was eloquently expressed by Olsen when petitioner inquired as to the protection afforded the men in the yard: "We just have to look out for ourselves, like we always have done" (R. 146). This fact was established by the testimony of all of the witnesses. See petitioner's testimony at R. 146, 155, and Olsen's testimony at R. 63, 64, 68, 70, 94, 95. "This lookout custom was followed because the men knew that under the practice in vogue there, without any blue flags or locking switches, a car might come down at any time and that the men has to take care of themselves" (R. 95).

Bingham's testimony was equally as definite. He testified that it was the uniform rule of the Navy yard at that time that it was up to the men to look after themselves (R. 137). This evidence was never contradicted or questioned by the respondents at any stage in these proceedings.

It is interesting to note that the Utah Court held as matter of law that this so-called lookout rule, which grew out of the efforts of the men to minimize the dangers and hazards of their employment and which in fact is based and founded on the instinct of self-preservation, was as matter of law

a discharge of respondents' duty to exercise reasonable care to furnish their employees a safe place to work.

To call this a safety rule is ridiculous. Looking out for themselves is just exactly what employees would naturally do without rules. If this is a safety rule then the railroad could always show a complete discharge of its admitted duty to promulgate and enforce adequate safety rules by the simple process of adopting or relying upon their employees to adopt one rule "Look out for yourselves."

Certainly the jury could well find, as it did, from this evidence, (a) that respondents sent their servant to work in a place fraught with danger, and (b) that the danger was enhanced by the fact that he was not given the protection of safety rules, regulations, methods or devices, and (c) that the injury suffered by him was proximately caused by the danger, hazards and unsafety of the work place. It thus appears that the verdict was rested upon a firm evidentiary basis and that the Supreme Court of Utah wrongfully deprived petitioner of a jury trial upon the principal issues of his case and wrongfully took from him his constitutional guarantee of trial by jury.

Specifications of Errors

1. The Supreme Court of Utah erred in vacating the jury's verdict and dismissing petitioner's cause.

2. The Supreme Court of Utah erred in holding as matter of law that the evidence was insufficient to require submission of the issue of respondents' negligence to the jury.

3. The Supreme Court of Utah usurped the functions of the jury in determining proximate cause as matter of law.

4. The Supreme Court of Utah wholly misconceived the legal principle upon which petitioner's action was founded and improperly and erroneously construed the facts by hold-

ing that petitioner failed to make a case for the jury for the following reasons:

(a) Proper and adequate safety rules and regulations had been adopted and promulgated.

(b) Respondents' "blue flag rule" had not been abandoned or waived.

(c) The Navy "switch lock rule" had not been abandoned or waived.

(d) Respondents were saved from liability by their own ignorance.

(e) The car inspectors "lookout practice" discharged respondents' admitted duty to promulgate and enforce safety rules, and its violation by petitioner and Olsen furnished respondents a complete shield against liability.

ARGUMENT

Point I

The Supreme Court of Utah erred in vacating the jury's verdict and dismissing petitioner's cause.

It appeared from the evidence that respondents directed petitioner, their employee, to work as a car inspector in the railroad yards of the Navy Supply Depot at Clearfield, Utah, a yard wherein many complex and dangerous switching operations were carried on by relatively inexperienced crews (R. 194). Approximately 12,000 cars were switched and handled by two large railroad companies and the Navy switching crews in these yards every thirty days (R. 35-36, 217-218). The car inspectors employed in these yards were required to work without the protection of safety rules, regulations or devices. Due to the lack of safety rules, regulations or devices the car inspectors were required to

protect themselves as best they could while working. Upon this state of the record the trial Judge denied respondents' motion for a directed verdict (R. 212, 245), and thus determined that the evidence was sufficient to require submission of the issues of negligence, proximate cause and contributory negligence to the jury. The jury found respondents guilty of negligence, which, in whole or in part, proximately caused petitioner's injury.

It becomes apparent from a consideration of the facts in this case that recent controlling and landmark decisions of this Court were ignored and disregarded by the Supreme Court of Utah.

The Utah Court held as matter of law that the conduct of respondents, as revealed by the evidence, did not show or establish a failure on their part to use and exercise reasonable care in furnishing their employee with a safe place to work.

The Utah Court in effect has held that as matter of law petitioner was solely responsible for his injury because he failed to adequately protect himself against the hazards and dangers of his work place.

The verdict of the jury was supported by substantial evidence and petitioner was clearly entitled to its benefits.

Petitioner was engaged in the performance of his required duties at a work place provided by respondents when injured. The place was dangerous and unsafe and there was a very definite causal relationship between the dangerous and unsafe condition of petitioner's work place and his injury. The court clearly erred in vacating the jury's verdict and dismissing petitioner's cause.

It is respectfully submitted that the holding of the Supreme Court of Utah is contrary to controlling decisions of this Court.

The right to trial by jury is a basic and fundamental fea-

ture of our system of federal jurisprudence. *Jacob* v. *New York City*, 315 U. S. 752, 86 L. Ed. 1166, 62 S. Ct. 854.

Where there is an evidentiary basis to support a verdict the appellate court's function is exhausted when the evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable. Only when there is a complete absence of probative facts to support a verdict for plaintiff may a court direct a verdict for defendant. *Lavender* v. *Kurn*, 66 S. Ct. 740, 90 Adv. Op. 692.

Questions of negligence under proper charge from the Court should be submitted to the jury for their determination, so long as the jury system is the law of the land and the jury is made the tribunal to decide disputed questions of fact. *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 87 L. Ed. 610, 63 S. Ct. 444. In the above case this Court declared:

> "It appears to be the clear Congressional intent that to the maximum extent proper, questions in actions arising under the Act should be left to the jury."

To deprive railroad workers of the benefits of jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them. *Bailey* v. *Central Vt. R. Co.*, 319 U. S. 350, 87 L. Ed. 1444, 63 S. Ct. 1062.

It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from a jury. The jury is the fact-finding body and the very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. *Tennant* v. *Peoria and Pekin Union R. Co.*, 321 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 520.

If from the evidence it appears that it would not have been unreasonable for the triers of the fact to infer that the

place of work was unsafe, a verdict for plaintiff must be sustained even though the jury might well have concluded that the place of work was entirely safe. The inferences to be drawn from uncontroverted as well as controverted facts are questions for the jury. *Ellis* v. *Union Pacific R. R. Co.*, 67 S. Ct. 598.

It is respectfully submitted that the Supreme Court of Utah in this case failed to construe and apply the Federal Employers' Liability Act in accordance with the foregoing controlling decisions; that it abdicated its duty to guard and protect the right of petitioner to a jury trial and wrongfully usurped the functions of the tribunal chosen by Congress to decide the questions of fact here presented.

Point II

The Supreme Court of Utah erred in holding as matter of law that the evidence was insufficient to require submission of the issue of respondents' negligence to the jury.

Petitioner based his case upon the charge that respondents failed in their duty to exercise reasonable care to furnish him a safe place to work in that they failed to either promulgate or enforce any safety rules or regulations for his protection while working as a car inspector. Respondents admit the duty as charged (R. 11). That respondents had said duty is clear from the authorities. This Court, in *Bailey* v. *Central Vermont Ry. Inc.*, 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444, stated:

> "Sec. 1 of the Act makes the carrier liable in damages for any injury or death 'resulting in whole or in part from the negligence' of any of its 'officers, agents, or employees.' The rights which the Act creates are federal rights protected by federal rather than local rules of law. (Citing authorities.) And those federal rules have been largely fashioned from the common law (Seaboard Air Line Ry. *v.* Horton, supra) except

as Congress has written into the Act different standards. Tiller *v.* Atlantic Coast Line R. Co., 318 U. S. 54, 63 S. Ct. 444, 87 L. Ed. —. At common law the duty of the employer to use reasonable care in furnishing his employees with a safe place to work was plain. 3 Labatt, Master & Servant (2d Ed.) Sec. 917. That rule is deeply engrained in federal jurisprudence. (Citing authorities.) As stated by this Court in the Patton case it is a duty which becomes 'more imperative' as the risk increases. 'Reasonable care becomes, then, a demand of higher supremacy, and yet, in all cases it is a question of the reasonableness of the care, reasonableness depending upon the danger attending the place or the machinery.' 179 U. S. page 664, 21 S. Ct. page 278, 45 L. Ed. 361. It is that rule which obtains under the Employers' Liability Act. (Citing authorities.) That duty of the carrier is a 'continuing one' (Citing authorities) from which the carrier is not relieved by the fact that the employee's work at the place in question is fleeting or infrequent."

The duty of exercising reasonable care in furnishing a safe place to work is personal to the master and nondelegable. *2 Shearman & Redfield on Negligence,* Revised Edition, Sections 193 and 202. The master's duty follows the servant to whatever place he is sent by the master to perform the duties of his employment even though that place is upon property owned by another and over which the master has no control. *Porter* v. *Terminal R. Ass'n of St. Louis,* 327 Ill. App. 645, 65 NE (2d) 31; *Ryan* v. *Twin City Wholesale Grocer Co. and Minn. Transfer Ry. Co.,* 210 Minn. 21, 297 N. W. 705; *Wegman* v. *Great Northern Ry. Co.,* 189 Minn. 325, 249 N. W. 422; *Albert Miller & Co.* v. *Wilkins,* 209 Fed. 582, at page 584; *Harding* v. *Railway Transfer Co.,* 83 N. W. 395; *Steller* v. *C. & NW Ry. Co.,* 46 Wis. 497, 1 N. W. 112, 49 Wis. 609, 6 N. W. 303.

In *Porter* v. *Terminal R. Association, supra,* an action brought under the Federal Employers' Liability Act, the

employer was held responsible for the unsafe condition of the premises of a third person and over which it had no control whatsoever when its employee in the course of his employment was injured while upon said premises as a result of their unsafe condition. The appellate court of Illinois stated:

> "It is the duty of the master to furnish the servant with a reasonably safe place to work. This duty also applies to machinery and instrumentalities used by the servant in his work and this duty follows the master even though the servant is sent upon the premises of another to do his work. This duty is nondelegable and affirmative and must be continuously fulfilled and positively performed." (Citing many supporting authorities.)

The failure to promulgate or enforce proper safety rules where reasonably necessary for the protection of employees, constitutes a failure on the part of the master to discharge his nondelegable duty to exercise reasonable care to furnish a safe place to work. *Reed* v. *Davis,* 251 N. Y. S. 704, affirmed 249 N. Y. S. 929, cert. denied 285 U. S. 54, 52 S. Ct. 314, 76 L. Ed. 934.

Petitioner when injured was working in a busy railroad yard as a car inspector. In the performance of his duties it was necessary for him to work between, under and around cars standing upon tracks onto which other cars might be kicked, shoved or shifted at any time by any one of six naval switching crews. Under such circumstances it was respondents' nondelegable duty to afford and provide petitioner with the protection of safety rules duly promulgated and properly enforced.

This duty has been well expressed in *3 Labatt's Master & Servant, 2nd Edition,* Section 1125, page 2982, as follows:

> "The work of repairing a car while it is standing upon a track in a yard where switching is in progress

> is one of peculiar danger, and the courts have always held railway companies to a strict account in regard to the duty of protecting employees engaged in such work, so far as that object can be attained by proper regulations. In fact, as already mentioned, (Sec. 110, ante), one of the very earliest cases, in which the employer's duty in regard to rules was discussed, established the doctrine that it is the duty of railway companies to provide for the protection of this class of workmen by proper regulations. The general principle, therefore, is well settled, that it is the duty of a railroad company to establish regulations advising its servants engaged in moving cars on a track of the whereabouts of an employee at work in this dangerous position, and to provide adequate means of warning him of the approach of danger."

The Utah Court misconceived the force and effect of the evidence heretofore set forth in petitioner's statement of the case, and in effect held that the duty of the respondents was in fact one that might be delegated and its nonperformance excused. Is there sanction in the law for the act of the Court in permitting the respondents to place the risk of harm resulting from the lack of safety rules, regulations, practices or devices in the yards, where petitioner was required to work, upon the shoulders of their servant? If so, what then would become of the established rule that the duty of the master to exercise reasonable care to furnish his servant a safe place to work is continuous and nondelegable? As pointed out herein the only rule of conduct prevailing and followed in the yards was the practice of the inspectors based upon the fundamental instinct of self-preservation "Every man must look out for himself." There is no fundamental instinctive regard for the safety of others. The truth expressed in the age-old question still prevails, "Am I my brother's keeper?" The very reason for the requirement that safe and proper methods of work be followed,

that proper and adequate safety rules and regulations be promulgated and enforced is the universal recognition of the fact that in the enjoyment of our own security we are all prone to forget the welfare and safety of others. Blue flags properly used and respected furnish protection for men required to work between and underneath cars. Switch locks perform similar service. Likewise properly promulgated and enforced safety rules and regulations. Observance of good rules and practices saves the lives and limbs of workmen. The law requires their adoption and enforcement to the end that hazardous conditions be eliminated and safety promoted. This requirement was not complied with in the Navy yards. Petitioner was grievously injured because he was not given the protection of proper rules, regulations or safety devices. Liability is here predicated upon this violation of duty and there is no escape from the conclusion that, inasmuch as the duty which was violated to petitioner's permanent injury was absolute and nondelegable, his employers are liable.

The evidence heretofore presented furnishes ample support for the verdict; clearly demonstrates that the place where petitioner was required to work was dangerous and unsafe; that he was required to work at a hazardous occupation without the protection of safety rules and regulations or safety devices, which respondents, his employers, were duty bound to furnish.

Point III

The Supreme Court of Utah usurped the functions of the jury in determining proximate cause as matter of law.

The Utah Court in determining the issue of proximate cause held that the negligence of petitioner was the sole proximate cause of his injuries.

This is another instance of a court employing contributory

negligence as a complete defense to an action arising under the Federal Employers' Liability Act contrary to the expressed terms of the Act and the controlling decisions of this Court.

The Utah Court stated:

> "Respondent seems to be the only inspector who adopted the two-man or 'lookout rule.' However, his injury on the date in question was brought about by his own violation of the very rule adopted by him. According to his best recollection that was the only time he ever went between or underneath the cars without a lookout being maintained for his protection. It does not appear that respondent was injured because any one safety rule had been abandoned. It appears, instead, that he was injured because he violated that rule which he claims to have adopted." (R. 259).

And also:

> "The fact that respondent was injured does not establish the fact that the rule adopted was not safe. Had the 'lookout' rule been complied with when respondent went between the cars, according to his own testimony, the accident would not have happened." (R. 259, 260).

And also:

> "He controlled the means by which the place could be made safe, and his own failure to properly perform his work was the only reason the place was rendered unsafe." (R. 262).

Assuming, for the moment, that petitioner and Olsen acted in violation of a "rule," it is submitted that such conduct was no more than contributory negligence. The trial court instructed the jury, as matter of law, that petitioner was guilty of contributory negligence. Petitioner has never agreed that the instruction was correct because he believes that his contributory negligence was a question of fact for

the jury. But regardless of this, his conduct could be no more than contributory negligence which is no longer a defense in an action under the Federal Employers' Liability Act, 45 U. S. C. A. Section 53.

The challenged holding on the question of proximate cause is in conflict with *Tennant* v. *Peoria & Pekin Union R. Co.*, 321 U. S. 29, 88 L. Ed. 520, 64 S. Ct. 409. There, the question was whether the failure to give warning of the intended movement of an engine could be found by the jury to be the proximate cause of the death of an employee. The Court stated:

> "The ultimate inference that Tennant would not have been killed but for the failure to warn him is therefore supportable. The ringing of the bell might well have saved his life. The jury could thus find that respondent was liable * * * death resulting in whole or in part from negligence of any of the * * * employees."

A jury could well find that the lack of proper safety rules and regulations contributed to cause petitioner's injury. If the blue flag rule or switch lock rule had been properly promulgated and enforced, plaintiff, without doubt, would have been thereby saved from injury. Petitioner would not have been injured but for the failure of the respondents to promulgate and enforce proper safety rules for his protection. Proximate cause is ordinarily a question for the jury. *Lavender* v. *Kurn*, 66 S. Ct. 740, 90 Adv. Op. 692.

The holding is likewise contrary to that of this Court in the case of *Bailey* v. *Central Vermont Ry. Co., supra,* wherein this Court held and stated:

> "The nature of the task which Bailey undertook, the hazards which it entailed, the effort which it required, the kind of footing he had, the space in which he could stand, the absence of the guardrail, the height of the bridge above the ground, the fact that the car could have been opened or unloaded near the bridge on level

> ground—all these were facts and circumstances for the jury to weigh and appraise in determining whether respondent in furnishing Bailey with that particular place in which to perform the task was negligent. The debatable quality of that issue, the fact that fair-minded men might reach different conclusions emphasized the appropriateness of leaving the question to the jury. * * * To withdraw such a question from the jury is to usurp its functions."

The results reached by the Utah Court on the matter of proximate cause are contrary to the holding of this Court in *Ellis* v. *Union Pacific R. R. Co., supra.*

The Utah Court evidently being in disagreement with the instruction of the lower court concerning the quality of petitioner's conduct holds that it was not contributory negligence but was, as matter of law, the sole proximate cause of his injury. This finding was employed not only to resolve and eliminate the issue of proximate cause but to relieve respondents of their nondelegable duty to furnish petitioner a safe place to work. In the very face of the plainly worded statute eliminating contributory negligence as a defense (45 U. S. C. A., Section 53), the Utah Court held that the contributory negligence of the petitioner barred recovery. They reach this erroneous result by using the simple expedient of calling contributory negligence "sole proximate cause". This court denounced this subterfuge in *Grand Trunk Western R. R. Co.* v. *Lindsay,* 233 U. S. 42, 34 S. Ct. 581, 58 L. Ed. 838, in the following language:

> "* * * and if the cause of action is established by showing that the injury resulted 'in whole or in part' from defendants' negligence, the statute would be nullified by calling plaintiff's act the proximate cause and then defeating him, when he could not be defeated by calling his acts contributory negligence."

This doctrine was reaffirmed in *Tiller* v. *Atlantic Coast*

Line R. Co., 318 U. S. 54, 87 L. Ed. 610, 63 S. Ct. 444. The holding of the Utah Court on the question of proximate cause is likewise contrary to the decisions of this Court in *Illinois C. R. Co.* v. *Skaggs*, 240 U. S. 66, 60 L. Ed. 528, 36 S. Ct. 249; *Union Pacific R. Co.* v. *Hadley*, 246 U. S. 330, 62 L. Ed. 751, 38 S. Ct. 318; *Spokane & Inland Empire R. R. Co.* v. *Campbell*, 241 U. S. 497, 60 L. Ed. 1125, 36 S. Ct. 683.

In determining as matter of law that petitioner's conduct was the sole proximate cause the Court entirely overlooks certain significant facts. Petitioner in the discharge of his duties was required to examine a coupler which was between two coupled cars (R. 66, 159). It was necessary for him to place his head and a portion of his body between the cars. The coupler was between the fourth and fifth cars from the north on Track No. 9. The northernmost car was about 100 feet from the switch. The lead track intersected the switch track as it proceeded through the yards from the northwest toward the southeast (Ex. "A", R. 246A). Cars on adjacent tracks obstructed petitioner's vision of the lead track (R. 169). It would take but from seven to fifteen seconds for a car traveling at a speed of from 5 to 10 miles per hour to cover the distance from the lead to the north car of the cut standing on Track No. 9. (This distance was 100 feet—R. 171). It is obvious that in the performance of his work as car inspector, petitioner could not spend all of his time keeping a lookout for moving cars, engines and other equipment. It is, therefore, apparent that at most, petitioner's conduct was contributory negligence which concurred with the negligence of the respondents in producing and causing the injury to petitioner herein complained of. *Union Pacific R. R. Co.* v. *Hadley*, 246 U. S. 330, 38 S. Ct. 318, 62 L. Ed. 751.

The negligence of respondents in failing to exercise due care to furnish petitioner a safe place to work was a definite causative factor in the cause of petitioner's injury. This

relationship was found by the jury. The finding is adequately supported by the evidence. It is submitted that the existence of liability on the part of respondents cannot be denied and should not have been eliminated by the Utah Supreme Court as matter of law.

Petitioner was penalized sufficiently for his own conduct. The jury found that he had suffered total damages in the amount of $125,275.26. Respondents have never claimed that this total assessment of damages was excessive. The jury deducted $85,000.00 from the verdict for the petitioner's contributory negligence. A further reduction would result in a most regrettable miscarriage of justice.

In its reasoning on the matter of proximate cause, the Court stated: "Even granting that the place was rendered unsafe by this violation of the 'blue flag' rule, the respondent himself had a better opportunity than the appellants to know of the increased danger. He controlled the means by which the place could be made safe and his own failure to properly perform his work was the only reason the place was rendered unsafe." This declaration emphasizes as well as illustrates the confusion of the Court in its efforts to apply the well settled principles of law to the facts here presented.

An employer can never discharge his obligation of exercising reasonable care to furnish his employee a safe place to work by informing the employee of the existence of the dangerous condition, for greater reason—the employee's right to the protection of the full performance of this nondelegable duty can never be lost by his discovery of the failure of his employer to discharge this duty. With respect to the matter of control, the holding of the Court is ridiculous. The place of work could never be reasonably safe so long as the switch crews disregarded and refused to respect the safety rules. Petitioner had no control over the switch crews. Petitioner was never in a position to either promul-

gate or enforce safety rules and regulations. All he could do was look out for himself as best he could. The only failure that can be attributed to him is that he attempted to perform his labor instead of spending all of his time in avoiding the dangers which arose from the failure on the part of respondents to exercise reasonable care to furnish him with a safe place to work. By this holding the Court, contrary to the will of Congress, has given recrudescence to the outlawed defense of contributory negligence.

Petitioner relied upon the case of *Merrill* v. *Oregon Short Line R. Co.*, 29 Utah 264, 81 P. 85, 110 Am. St. Rep. 695, as authority for the proposition that it was respondents' duty not only to promulgate, but also to enforce reasonable safety rules. While not denying the validity of this principle of law, the court exonerates respondents of responsibility for their failure to promulgate and enforce safety rules in the yards where they required their servant to work, by the following reasoning:

> "Therefore, if appellants engaged any one to see that the rules were being enforced, the only one it could have been, under the facts of this case, was the respondent himself; and it would be most unreasonable to hold that in a suit by an employee, his own negligence is the negligence of his employer" (R. 257).

This statement deserves critical scrutiny. Petitioner was employed as a car inspector and as such was entitled to the protection of reasonable safety rules properly enforced. The respondents were duty bound to provide this protection. The Court, contrary to law, has now placed upon petitioner the sole responsibility of supplying himself with the protection which his employer was duty bound to furnish.

Wikane never informed or suggested to petitioner that he was to concern himself with the promulgation or enforcement of rules. He was merely told to contact the inspectors in the yard and find out what to do. It was necessary for him to accept conditions and practices as he found them and to accept protection or danger as naturally resulted from the system prevailing at the place of employment. As matter of law he was entitled to assume that his employer knew of the conditions under which he would be required to work. He was sent there as a substitute for an inspector who had been working in the yards for more than a year. How can it be said that petitioner was solely responsible for the unsafe condition existing in the yards simply because he knew of the dangers and his employers, due to their ignorance and lack of interest, did not. The Utah Court has disregarded the well-established principle of law that the master owes a continuing duty of supervision. In *2 Shearman and Redfield on Negligence*, revised Edition, Section 214, the rule is stated as follows:

> "It is a universal American rule that the master is personally bound to maintain 'such an oversight and supervision' of his servants and business, as will enable him to discover, within a reasonable time, the incompetency or habitual negligence of any servant, the defects of any place or appliance provided for work or *the failure of his servants to conduct the business in pursuance of his rules.*
>
> "Masters, whether present or absent, have been held to personal responsibility for such general supervision as a prudent master would give if personally present. If the master chooses to delegate this supervision to an agent, or if he undertakes work on so large a scale as to leave him no choice but to so delegate it, his responsibility stands upon the same footing, in this case, as in the other duties of supervision."

Point IV

The Supreme Court of Utah wholly misconceived the legal principle upon which petitioner's action was founded and improperly and erroneously construed the facts by holding that petitioner failed to make a case for the jury for the following reasons:

(a) *Proper and adequate safety rules and regulations had been adopted and promulgated.*

The Supreme Court in commenting on the evidence declared:

> "The evidence is uncontradicted that both the appellants and the U. S. Navy did in fact promulgate and publish reasonable rules for the safety of their respective employees." (R. 257.)

The Court quoted the blue flag rule at length (R. 257). The language of that rule clearly indicates that to be effective it must be respected and observed by two distinct groups of workmen: (1) car repairmen and inspectors, and (2) switchmen. It is obvious that the car inspectors could not find protection under this rule unless it was respected and obeyed by switchmen. It is clear from the evidence that respondents' blue flag rule was never respected by the switchmen in the Navy yards. As pointed out in the statement of the case Inspector Roseberry abandoned and discontinued using blue flags after the switch crews ran over the second flag. There is no evidence in this record that respondents ever promulgated the rule or attempted to bring their own inspectors working in the Navy yards under its protection. The statement of the Court that respondents promulgated their blue flag rule for the protection and benefit of petitioner while at work in the Navy yards is not only unsupported by the evidence but is positively contrary to the undisputed facts.

The Navy rule was never promulgated, enforced or observed there prior to petitioner's injury as clearly appears from the testimony of the Navy inspectors. There is no evidence that petitioner ever received or was given a copy of the Navy rules, or that he ever knew of their existence prior to the trial. The Navy inspectors were never advised of these Navy rules until after petitioner's injury. Switch locks, the only means by which the rule could be complied with, were never furnished to the Navy inspectors, petitioner or anyone else working in these yards until after the accident.

The Court's statement and holding above referred to cannot be defended or justified upon the evidence offered and received in this case. The Court evidently entirely ignored petitioner's testimony to the effect that when he reported to the Navy inspectors for instructions pursuant to the direction of Wikane, he was told "We don't use blue flags here. They would not do any good if we did have them" (R. 146). The Court entirely overlooked the testimony of petitioner, Olsen, Bingham and Roseberry to the effect that blue flags were not used in the yards and were not respected by switch crews when it held that the respondents had promulgated reasonable safety rules. It entirely overlooked the testimony of all witnesses when it declared that the Navy had promulgated reasonable rules.

The unquestioned evidence in this case justifies petitioner in stating positively that the respondents' blue flag rule and the Navy switch lock rule were never promulgated, enforced, followed or respected by either carmen or switchmen in the Navy yards during the whole course of petitioner's employment there. No court has ever held that a master may discharge his duty to promulgate and enforce reasonable safety rules where such rules are required to make a work place safe by the mere act of publication. As

stated in *3 Labatt's Master & Servant, Second Edition,* Section 1119, page 2961:

> "The failure to bring a rule to the knowledge of the employee or employees by whose agency it is to be carried out obviously involves the same consequences, in a juridical point of view, as the entire omission to frame that rule."

It is stated in *39 C. J. 476, Master and Servant,* Section 590, as follows:

> "To relieve the master of liability for injuries to a servant resulting from the disregard of the rules adopted by him for the management of his business and the government of his servants, the servant must have had knowledge, actual or constructive, of the rules. The duty of the master as to giving notice is ordinarily performed when he has made the rules known to his servants, which rules if observed and followed by all concerned will bring such personal notice to every one entitled to it."

The error of the Utah Court in this holding is obvious.

(b) *Respondents' blue flag rule had not been abandoned or waived.*

(c) *The Navy switch lock rule had not been abandoned or waived.*

The Utah Court labored with the solution of the question as to whether or not there had been a waiver or abandonment of respondents' blue flag rule and the Navy's switch lock rule, and finally determined that no such waiver or abandonment had been established by petitioner and therefore he had to that extent failed to discharge his burden

of proof on the question of respondents' negligence. This whole question is immaterial.

As heretofore indicated in the statement of the case, neither the respondents' blue flag rule or the Navy's switch lock rule were ever promulgated, enforced, respected or in effect in the Navy yards while petitioner was employed there. It is submitted that there can be no waiver or abrogation of a rule not in existence.

Petitioner's case is based upon the well-founded charge that his place of work was rendered dangerous and unsafe by reason of the fact that no safety rules or regulations were ever promulgated or enforced, and that no safety devices were ever provided. Petitioner contended in the Supreme Court of the State of Utah, and contends here, that from the testimony a jury would be justified, if not required as matter of law, to find that the duty to promulgate and enforce safety rules was violated; that neither respondents' blue flag rule nor the Navy's "switch lock rule" were ever followed, respected or enforced at any time during the year immediately preceding his injury. The jury found favorable to the plaintiff on the issue of respondents' negligence. The matter of waiver, abandonment or abrogation of rules is of no consequence or materiality whatsoever.

Petitioner sincerely contends that the Court committed reversible and prejudicial error in considering this proposition of waiver and using it as a legal prop for their opinion wherein his right to the jury trial guaranteed him by the Constitution was defeated and denied.

The holding of the Utah Court on this matter of waiver illustrates its misapprehension of the sound legal basis upon which petitioner's case was founded. The whole point

to be resolved is, whether or not petitioner, upon the evidence produced, was entitled to have the matter of respondents' negligence submitted to the jury. If the master is required to provide the protection of proper safety rules, regulations and devices to employees while engaged in work fraught with danger, and if this duty is personal, continuing and nondelegable, how can the matter of waiver ever become of any importance in determining the master's liability for a charged failure to discharge the duty? In this case the respondents have never claimed or asserted that its blue flag rule was ever enforced or respected or in effect in the Navy yards. Even conceding the legal correctness of the Court's determination that respondent's blue flag rule and Navy switch lock rule had not been abrogated, how can such determination supply any justification for the holding that petitioner was not entitled to have the issue of respondents' negligence submitted to the jury? The violation of duty upon which petitioner predicated his cause of action is stated in Labatt's Master & Servant, Section 1120, page 2962, as follows:

> "An employer does not discharge his whole duty by merely framing and promulgating proper rules for the conduct of his business, and the guidance and control of his servants. He is also under the obligation of enforcing the rules, in so far as that result can be attained by exercising a reasonably careful supervision over his business and his servants. In other words, a master's duty does not end with prescribing rules calculated to secure the safety of employees. It is equally binding on him honestly and faithfully to require their observance."
>
> * * * * * * *
>
> "Whether the master was negligent in failing to enforce a rule adopted by it is a question of fact for the jury."

(d) *Respondents were saved from liability by their own ignorance.*

The Utah Court has permitted respondents to take safe refuge behind the shield of their own ignorance of conditions and practices which existed and were followed in the yards where they sent their servant to work. They state in effect that it was encumbent upon petitioner to show that respondents had knowledge of the habitual non-compliance with the blue flag rule and the customs followed in the yards. It appears, however, that respondents never at any time exerted any effort to discover or determine what rules, methods or practices were being followed in the yards and thus by their lack of interest, they have kept well preserved the ignorance which the Court now permits them to use as a defense. They are thus generously rewarded, at petitioner's expense, for their ignorance. By this holding the Court has permitted the master to shift the duty to promulgate and enforce safety rules and regulations and provide proper safety devices from their shoulders to the shoulders of the servant.

Did appellants have a right to assume that their rule as to the blue-flags was being enforced by the Navy? Was it not their duty to know before sending respondent to the place of work what rules were being enforced, if any, and what protection their employees had?

In speaking of the continuing and nondelegable phase of this duty, the Court in *O. & M. Ry. Co.* v. *Wangelin,* 43 Ill. App. 324, at pages 330 and 331, states:

> "* * * In such a case it is said as to civil remedy, the question is to be considered as if the master was present, saw the improper construction or use, and with such knowledge permitted the servant to use such machinery. For this reason notice to the master is unnecessary in such cases. * * * The same rule of

reasonable care with reference to proper machinery and inspection applies in the case of cars belonging to other persons which the servant is required to operate in the course of the master's business, as governs when the cars are owned and provided by the master himself."

(e) *The car inspectors' lookout practice discharged respondents' admitted duty to promulgate and enforce safety rules and its violation by petitioner and Olsen furnished respondents a complete shield against liability.*

No safety rules or regulations having been promulgated or enforced in the Navy yards, the car inspectors, as matter of necessity, were forced to look out for themselves. Such practice was born of the dangers and hazards of their employment. It is now dignified by the Utah Court to the position of a safety rule and having been designated as such it is employed to provide respondents with a complete discharge of their admitted duty to promulgate and enforce proper safety rules. On the basis of this judicial finding, the Court justifies its determination that the sole proximate cause of petitioner's injury was his failure to obey this so-called rule. The absurdity of this determination is apparent. It furnishes judicial sanction for a railroad's refusal to promulgate or enforce safety rules and regulations, it being well known that those subjected to danger in obedience to the law of self-preservation will do the best they can to "look out" for themselves. If the law were such as declared by the Utah Supreme Court, the railroads could always meet the requirement of promulgating and enforcing proper safety rules by adopting and publishing the rule "Employees must look out for themselves."

The Utah Court states that "the lookout rule was safer than the blue flag rule." What the Court really means is

that the lookout rule followed by the men was safer as far as they were concerned than a "blue flag rule" which was neither obeyed, recognized or respected by the switch crews.

The Court fails to recognize the obvious fact that petitioner was powerless to promulgate or enforce a blue flag rule or a switch lock rule in such manner as to afford safety to himself and fellow employees. Petitioner, while in the course of his employment, suffered permanent, disfiguring and crippling injury due to the dangers of his place of work. He was not responsible for these dangers; he attempted as did Olsen, Bingham and the other inspectors, to minimize the dangers by looking out for himself. This practice, born of necessity, should not be employed to rob him of the fruits of the verdict awarded by the jury.

Conclusion

If the opinion of the Supreme Court of Utah is permitted to stand, the Federal Employers' Liability Act will not afford railroad workers in Utah the same remedy and protection that it affords in other jurisdictions where the decisions of this Court are respected and followed. It will not do to say in Utah that the decisions of this Court are controlling where the interpretation and effect of the Federal Employers' Liability Act is involved, since trial courts usually follow the decisions of their immediate appellate courts. Contributory negligence is called and designated "sole proximate cause" in Utah and liability is denied as matter of law where such contributory negligence exists.

It is respectfully submitted that the opinion of the Supreme Court is in conflict with the express provisions of the Federal Employers' Liability Act and controlling decisions of this Court construing that Act. A writ of certiorari should be granted in order for this Court to review the rec-

ord and the opinion of the Utah Court and finally reverse the same and reinstate the judgment of the trial court.

Respectfully submitted,

PARNELL BLACK,
Counsel for Petitioner.
530 Judge Building,
Salt Lake City, Utah.

Of Counsel:
WILLARD HANSON,
DAVID A. WEST,
1010 Boston Building,
Salt Lake City, Utah.
B. E. ROBERTS,
530 Judge Building,
Salt Lake City, Utah.